Office-Supreme Court, U.S.
FILED
MAR 12 196
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

No. 681

THE MIAMI HERALD PUBLISHING CO., a Florida corporation, *Petitioner*,

v.

DOROTHY M. BRAUTIGAM, as Administratrix of the Estate of George A. Brautigam, Deceased, *Respondent*.

PETITIONER'S REPLY BRIEF

ELISHA HANSON
808 Seventeenth Street, N. W.
Washington 6, D. C.

JOHN G. THOMPSON
Alfred I. Dupont Building
Miami 32, Florida

Attorneys for Petitioner

Of Counsel:

ARTHUR B. HANSON
CALVIN H. COBB, JR.
EMMETT E. TUCKER, JR.
808 Seventeenth Street, N. W.
Washington 6, D. C.

HERVEY YANCEY
L. S. BONSTEEL
Alfred I. Dupont Building
Miami 32, Florida

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

INDEX

	Page
This Court Has Jurisdiction To Grant Certiorari	2
(a) A Substantial Federal Question Is Involved	2
(b) The Federal Question Was Properly Raised and Was Decided By the Court Below	4
(c) The Judgment Below Cannot Be Sustained on Independent Grounds of Florida Law	7
This Court Should Exercise Its Jurisdiction and Grant Certiorari	8
Conclusion	8

TABLE OF CASES

Beauharnais v. *Illinois*, 343 U.S. 250 (1952)	2
Manhattan Life Insurance Co. v. *Cohen*, 234 U.S. 123 (1914)	6
Michigan-Wisconsin Pipe Line Co. v. *Calvert*, 347 U.S. 157 (1954)	5
Raley v. *Ohio*, 360 U.S. 423 (1959)	6

CONSTITUTIONAL AND STATUTORY PROVISIONS

First Amendment to the Constitution of the United States	2, 3, 4, 7, 8
Fourteenth Amendment to the Constitution of the United States	2, 3, 4, 7, 8
28 U.S.C. Section 1257	5
28 U.S.C. Section 1257 (3)	6, 7

IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

No. 681

THE MIAMI HERALD PUBLISHING CO., a Florida corporation, *Petitioner,*

v.

DOROTHY M. BRAUTIGAM, as Administratrix of the Estate of George A. Brautigam, Deceased, *Respondent.*

PETITIONER'S REPLY BRIEF

For the sake of brevity, Petitioner's brief in reply to Respondent's brief in opposition to the granting of certiorari will be limited to the questions as to whether this Court has jurisdiction, and if so, whether that jurisdiction ought to be exercised by granting the writ of certiorari prayed for herein. Petitioner deems it unnecessary to reply to Respondent's arguments on the merits.

THIS COURT HAS JURISDICTION TO GRANT CERTIORARI

Respondent objects to the jurisdiction of this Court on the grounds that no substantial federal question is involved, that a federal question was not properly raised in the trial court and that the judgment in question can be sustained on independent grounds of Florida law (Respondent's Brief, pp. 2-6). Petitioner respectfully submits that:

a. A Substantial Federal Question Is Involved

Contrary to Respondent's argument, Petitioner does not and has never contended that libelous utterances are within the area of constitutionally protected free speech. Petitioner does assert, *inter alia*, that the determination under state law of what is a libelous utterance may not conflict with the Federal constitutional guaranties of free speech and free press. Thus, as was stated by this Court in *Beauharnais* v. *Illinois*, 343 U.S. 250, 263-264 (1952):

> "* * * 'While this Court sits' it retains and exercises authority to nullify action which encroaches on freedom of utterance under the guise of punishing libel."

Petitioner raises the further question whether judicial errors in the course of a libel trial, in effect destroying the defense of fair comment, may conflict with those constitutional guarantees under the First and Fourteenth Amendments to the Constitution of the United States. By virtue of the rulings and judgment of the trial court, which were affirmed by the judgment of the highest court of Florida in which a decision could be had, Petitioner asserts that it was effectively deprived of its defense of fair comment

which is protected under the free speech and press guaranties of the First and Fourteenth Amendments. Judge Charles Carroll recognized the presence of a substantial federal question when, in dissenting from the judgment of the District Court of Appeal of Florida, Third District, affirming the judgment entered by the trial court against this Petitioner, he said (Petitioner's Appendix, 5a-35a, at 15a, 17a-18a):

> "At the risk of oversimplification, it may be said that the manner and extent to which the defendant publisher was deprived of the benefit of the defense of fair comment and, therefore, of its constitutionally guaranteed freedom of speech and of the press, was this: Under the law upon which the publisher was entitled to rely when the publications were made, the defendant publisher might or might not have succeeded before a jury on the defense of fair comment, but on the basis on which this case was tried, with the subsequently rendered Interim Report case opinion of the Supreme Court of Florida before the jury, the defense was doomed."

If the right of fair comment is constitutionally protected, then Petitioner has raised substantial federal questions in respect of (A) the extent to which the right to comment on matters of public concern is protected as a matter of Federal constitutional law; and (B) whether the rulings below (Petition for Writ of Certiorari, pages 25-28) effectively deprived Petitioner of its defense of fair comment as a matter of Federal constitutional law.

b. The Federal Question Was Properly Raised and Was Decided by the Court Below

Respondent admits that Petitioner invoked the First Amendment at the outset of the case in its Answer to the Complaint, but asserts that this Court's jurisdiction should not be exercised because the Fourteenth Amendment was not invoked until Petitioner filed its Assignments of Error on appeal to the District Court of Appeal of Florida, Third District.

In the case at bar the First Amendment was invoked in Petitioner's Answer in the trial court and counsel for the parties made repeated references to free speech and press during the course of the trial (R. 150-151, 183, 756-757, 779, 783-784, 805, 808, 818, 821, 823-824). In its Assignments of Error both the First and the Fourteenth Amendments were invoked by Petitioner. The questions in respect of free speech and press were "essentially involved" in the pleadings before the trial court and were squarely presented to the court below on appeal in the Assignments of Error, in Petitioner's brief and in argument. There can be no doubt that the court below considered and decided, adversely to Petitioner, the assertion of the right of free speech and fair comment under the Federal Constitution. The District Court of Appeal stated in its opinion (Petitioner's Appendix, 5a-35a, at 10a-11a):

> "The appellant [Petitioner herein] contends the judgment deprived it of the right of free speech and fair comment guaranteed by the First and Fourteenth Amendments of the United States Constitution, as well as Section XIII of the Declaration of Rights of the Florida Constitution.
>
> * * * *
>
> "* * * The difficulty in construing these constitutional guarantees arises when the right of free expression collides with an individual's right to

> the protection of his good name. These conflicts defy precise analysis. However, it is sufficient for this discussion to say that the rights of free speech and press were designed primarily to prevent interference by the government with a man's speech or writing but not to obviate his responsibility for what has been published."

In dissenting from the majority opinion of the District Court of Appeal, Judge Charles Carroll also recognized that the issues of free speech and free press was before the court, saying (Petitioner's Appendix, 5a-35a, at 34a-35a):

> "That basis on which this case was tried, and the erroneous charge, each operated to strip from the defendant its shield of fair comment, and thereby to withhold from it freedom of speech and of the press, in violation of the First and Fourteenth Amendments to the Constitution of the United States by denying to defendant, due process of law."

It is to be noted that this Court's jurisdiction under 28 U.S.C. Section 1257 is to review the final judgments or decrees of "the highest court of a State in which a decision could be had". In this case, the Supreme Court of Florida held that it was without jurisdiction to review on direct appeal from the trial court and, after the District Court of Appeal had entered its decision on the merits, the Supreme Court of Florida refused to grant review by certiorari (Petitioner's Appendix, 2a-5a, 35a, 36a). Thus, the highest court of the State of Florida in which a decision could be had was the District Court of Appeal, Third District. *Michigan-Wisconsin Pipe Line Co.* v. *Calvert*, 347 U.S. 157 (1954). It is the judgment of that court which is properly brought here for review. Significantly, Respondent has not challenged Petitioner's position.

In *Raley* v. *Ohio*, 360 U.S. 423 (1959) this Court dismissed the appeals there pending but granted review by writ of certiorari. Asserting its jurisdiction under 28 U.S.C. Section 1257 (3) to review by writ of certiorari, the Court said, at pages 436-437:

> "* * * There can be no question as to the proper presentation of a federal claim where the highest state court [Supreme Court of Ohio] passes on it. See Manhattan L. Ins. Co. v. Cohen, 234 US 124, 134, 58 L ed 1245, 1253, 34 S Ct 874. We think this sufficient here to satisfy the statutory requirement that the federal right sought to be vindicated in this Court be one claimed below; 28 USC § 1257 (3)."

In *Manhattan Life Insurance Co. v. Cohen*, 234 U.S. 123, at page 134 (1914), cited in the *Raley* case, *supra*, this Court refused jurisdiction but it set forth the rationale supporting jurisdiction as follows:

> "* * * where the record leaves no doubt that rights * * * [required to be expressly set up and claimed in the court below] were *essentially involved* and were necessarily passed upon, there would be jurisdiction to review even although such rights had not been expressly asserted below (see Tilt v. Kelsey, 207 U.S. 43, 51, 52, L. ed. 95, 99, 22 Sup. Ct. Rep. 1); the right to review under such condition being in effect but a result of the elementary rule that *it is irrelevant to inquire how and when a Federal question was raised in a court below where it appears that such question was actually considered and decided.*" (Emphasis supplied)

As a consequence of the foregoing, Petitioner respectfully submits that the federal question here presented was properly raised and was decided by the highest court of Florida in which a decision could be

had within the meaning of the requirements set forth in 28 U.S.C. Section 1257 (3).

c. The Judgment Below Cannot Be Sustained on Independent Grounds of Florida Law

At page 6 of its Brief, Respondent contends in substance that since fair comment is no defense to a libel published with actual malice, the judgment in question can be sustained on independent grounds of Florida law. Petitioner deems it improper to argue the merits on the question of actual malice, and refrains from doing so, other than to note that throughout the trial Respondent disclaimed the existence of "personal animosity", "ill-will", "hatred", or "ill-feeling" toward him on the part of Petitioner or its employees (R. 164, 302-308, 362-363, 544, 751, 829); and, although Respondent has relied upon the theory that Petitioner bore actual malice toward him because of its desire to secure the removal of Dade County Circuit Judge George E. Holt, not a shred of evidence was adduced in support of that contention (See Respondent's Brief, pages 20-21; Petition for Writ of Certiorari, pages 15, 23).

Respondent misapprehends the effect of the decision below. As recognized in both the majority and dissenting opinions of the District Court of Appeal, Third District, the judgment rests squarely upon its resolution of the question whether or not Petitioner was deprived of its constitutionally protected rights under the First and Fourteenth Amendments. Accordingly, the holding by the court below that the evidence (including that in respect of actual malice) was sufficient to support the judgment was inextricably interwoven with the constitutional questions presented by the Petition herein.

THIS COURT SHOULD EXERCISE ITS JURISDICTION AND GRANT CERTIORARI

The questions raised by this petition for a writ of certiorari are of vital consequence to every citizen, including newspapers, who would publicly take issue with and criticize those who govern or represent them. Implicit in the questions here presented is the proposition that the rights guaranteed by the First and Fourteenth Amendments to the Constitution are not exhausted by exercising the mere right to make the utterance. It is respectfully submitted that the shield afforded by those Amendments also protects the right to a fair trial on the defense of fair comment under the rules of law in effect at the time the utterance was published.

CONCLUSION

For the reasons herein advanced, and for those set forth in the Petition, it is respectfully submitted that this Court should, and properly may, exercise its jurisdiction by issuing a writ of certiorari to review the judgment of the court below.

Respectfully submitted,

ELISHA HANSON
808 Seventeenth Street, N. W.
Washington 6, D. C.

JOHN G. THOMPSON
Alfred I. Dupont Building
Miami 32, Florida

Attorneys for Petitioner

Of Counsel:

ARTHUR B. HANSON
CALVIN H. COBB, JR.
EMMETT E. TUCKER, JR.
808 Seventeenth Street, N. W.
Washington 6, D. C.

HERVEY YANCEY
L. S. BONSTEEL
Alfred I. Dupont Building
Miami 32, Florida